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July 13 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

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CLERK DISTRICT COURT

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BY DAVE HANSEN
DEPUTYMONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTYBNSF RAILWAY COMPANY, a
Delaware corporation,

Petitioner,

v.

CHAD CRINGLE; MONTANA
DEPARTMENT OF LABOR AND
INDUSTRY, and HUMAN RIGHTS
COMMISSION,

Respondents.

Cause No. BDV-2009-1016

**AMENDED ORDER
CONCERNING MOTION FOR
STAY OF EXECUTION OF
JUDGMENT PENDING APPEAL
AND DENYING APPROVAL OF
SUPERSEDEAS BOND**

This Amended Order is provided pursuant to the Montana Supreme Court's June 23, 2010 Order requesting specific findings and conclusions as to why a stay pending appeal was denied Petitioner and Appellant BNSF Railway Company. On May 21, 2010, this Court denied BNSF's motion to stay execution of the judgment pending appeal and refused to accept BNSF's insufficient bond in the amount of \$293,150.54. On June 11, 2010, however, in response to attempts by Cringle to collect on the judgment, this Court entered a Protective Order and Order Quashing Subpoena, thereby granting BNSF's request for a stay of execution of judgment pending appeal.

1 BNSF's bond, however, remains insufficient.

2 Based on the evidence, the Court enters the following:

3 **FINDINGS OF FACT**

4 1. Chad Cringle filed a complaint with the Montana Human Rights
5 Bureau (HRB) on July 17, 2008 alleging that he had been discriminated against based
6 on his height and weight without regard to his individual qualifications for the job of
7 conductor trainee with BNSF Railroad Company. On January 7, 2009, the HRB found
8 probable cause that discrimination had occurred.

9 2. The case proceeded to a contested case hearing before the
10 Montana Department of Labor (DOLI). Like this Court, the Montana Supreme Court
11 has twice affirmed the Department's rulings against BNSF in cases with the same fact
12 pattern as this case. See *Mont. Dep't Labor v. BNSF Ry. Co.*, 2009 MT 262N, 2009
13 Mont. LEXIS 394 (Consolidated Cause Nos. DA-08-0517, DA-08-0558, DA-08-
14 0559); *Bilbruck v. Burlington N. & Sante Fe Ry. Co.*, 2009 MT 216N, 2009 Mont.
15 LEXIS 256 (Cause No. DA-08-0424). In both of those cases timely appeals were filed
16 with the Human Rights Commission (HRC); both were appealed to this Court; and
17 then affirmed by the Montana Supreme Court. The only distinguishing fact is that in
18 this case, BNSF's appeal of the hearing examiner's decision to the HRC was untimely.

19 3. The contested case hearing was held in May 2009 and on
20 September 2, 2009, DOLI hearing officer Terry Spear issued his decision finding
21 BNSF had discriminated against Cringle when it denied him employment on
22 May 5, 2008 based on BNSF's perception that Cringle was disabled. Spear's decision
23 required BNSF to pay Cringle damages and, like similar orders issued by DOLI,
24 required BNSF to take other affirmative action to ensure that continuing discrimination

1 of a similar nature by BNSF does not take place.

2 4. BNSF admits receiving the decision on September 3, 2009. (Pet.
3 Jud. Review or Alternatively Pet. Writ and/or Declar. J., ¶ 10.) While notice was
4 provided of the statutory deadline set forth in Section 29-2-505, MCA, BNSF claims it
5 did not file an appeal within the statutory fourteen-day period due to the decision being
6 misfiled or otherwise misplaced by staff. (Id.) While BNSF admits the appeal
7 deadline ended (at the very latest) on September 21, 2009, it admittedly did not file its
8 notice of appeal until September 22, 2009. (Id., ¶ 12.) With its belated notice of
9 appeal, BNSF also filed a “request for a one day extension” of the fourteen-day period.

10 5. On October 5, 2009, the HRC issued its order stating, “Pursuant to
11 Mont. Code Ann. § 49-2-505(4), a decision is final unless a party seeks review by
12 filing an appeal within 14 days after the issuance of the notice of decision.” (Resp.
13 [Cringle’s] Cross-Pet. Enforce. Final Agency Dec., Ex. 2.) Because the notice of
14 appeal was not received within the fourteen-day period, it was dismissed by the HRC.
15 (Id.)

16 6. BNSF’s petition for judicial review was filed in this Court
17 on November 2, 2009. The petition requests that this Court determine that the HRC
18 had authority to extend the fourteen-day period (if it has chosen to do so) and seeks
19 remand to the HRC with instruction that the notice of appeal should be considered
20 timely and that a hearing be held on the merits of the appeal. (Id., ¶ 13.)

21 7. While both Cringle and the HRC filed motions to dismiss BNSF’s
22 petition for judicial review, both also filed petitions to enforce the DOLI decision.

23 8. On March 15, 2010, this Court entered an order, which was
24 amended by a Nunc Pro Tunc Order dated March 29, 2010. The latter order explained

1 that this Court lacks subject matter jurisdiction of BNSF's petition for judicial review
2 because the fourteen-day deadline made Spear's decision non-appealable under Section
3 49-2-503(3)(c), MCA.

4 9. This Court also determined that it had jurisdiction over both DOLI
5 and Cringle's petitions to enforce the final agency decision and to grant attorney fees.

6 10. On March 29, 2010, Cringle's counsel was instructed to submit an
7 affidavit of attorney fees and costs, and BNSF was instructed to pay all reasonable
8 attorney fees and costs which are owing within five business days of its receipt of
9 Cringle's attorney's affidavit. BNSF was allowed to object within that time period to
10 those attorney fees and costs which it believed were unreasonable, and the parties were
11 to schedule a date for hearing on the attorney fee issue. The successful party at any
12 further hearing was to be granted his/its attorney fees as well.

13 11. No objection to fees having been filed by BNSF, this Court
14 entered Judgment in favor of Cringle, and against BNSF, and affirmed the Final
15 Agency Decision dated September 2, 2009 including: 1) \$148,472 for back pay, lost
16 fringe benefits, emotional distress damages, and interest on those amounts due as of
17 September 2, 2009; 2) front pay in the following amounts due on the following dates,
18 \$60,508 due on May 5, 2010, \$90,310 due on May 5, 2011, and \$90,310 due on
19 May 5, 2012; 3) interest on the \$148,472 back pay award at the rate of 10 percent per
20 annum from September 2, 2009 to the date of this Court's April 9, 2010 judgment; 4)
21 interest on the judgment from the date entered until paid except that interest on each
22 installment of front pay commences on the date the installment is due; 5) all
23 contributions to social security and medicare due for payment of any of the above
24 amounts; 6) attorney fees pursuant to Sections 49-2-505(8) and 49-4-102, MCA, in the
25

1 amount of \$38,820; 7) costs in the amount of \$11,567.21; and 8) interest on attorney
2 fees and costs in the amount of 10 percent per annum from the date of judgment until
3 paid.

4 12. Thereafter, BNSF filed its motion to stay execution of the
5 judgment and requested approval of its *supersedeas* bond in the amount of
6 \$293,150.54. Because the *supersedeas* bond was insufficient to cover the judgment
7 and because grounds for the stay did not appear warranted, especially since this case is
8 analogous to the above-cited discrimination cases which the Montana Supreme Court
9 has affirmed, this Court denied BNSF's request for stay of execution and for approval
10 of its insufficient bond.

11 13. In May 2010, Cringle's counsel made attempts to collect on the
12 judgment by issuing a *subpoena duces tecum* and scheduling the deposition of Rick
13 Bartoskewitz, BNSF's General Manager for its Montana division. BNSF filed a
14 motion for protective order and a motion to vacate the deposition pending this appeal.

15 14. On June 11, 2010, this Court entered its Protective Order and
16 Order Quashing Subpoena pending this appeal, thereby granting BNSF's request for a
17 stay pending a ruling from the Montana Supreme Court. In its June 11, 2010 Order,
18 this Court specifically reserved the right to review its decision at any time. This Court
19 also based its decision quashing the subpoena because it was under the mistaken view
20 that the matter would be quickly resolved. It now appears that this is not the case, and
21 this Court will exercise its reserved right to vacate its July 11, 2010 Order.

22 15. As a result of BNSF's unlawful discrimination, Cringle remains
23 unemployed and, at the time of BNSF's application for a stay and *supersedeas* bond,
24 he was having difficulty making house payments, his vehicle had been repossessed, he
25 had sold personal possessions and pawned tools of his trade to support himself, and

1 was, in general, depending on friends and family for financial assistance. He is in
2 danger of losing his home soon if he does not find money with which to pay his taxes.

3 16. Because this Court presided over the two previous appeals, it is
4 familiar with the factual background, the legal issues, the likelihood of success on
5 appeal, BNSF's previous failure to raise any substantive issues on appeal, and the
6 unreasonable delay that was caused by BNSF's appeals in the previous two cases.

7 From the foregoing findings of fact, the Court enters the following:

8 **CONCLUSIONS OF LAW**

9 1. Article VII, section 4, of the Montana Constitution allows for
10 appeals of administrative agency decisions to district courts. Mont. Const., art. VII,
11 § 4(2). Section 49-2-503(3)(c), MCA, requires that DOLI decisions be appealed to the
12 HRC within fourteen days. The statute simply states: "If the decision is not appealed
13 to the Commission within fourteen days as provided by subsection (f), the decision
14 becomes final and is not appealable to the district court." The legislature has limited
15 this Court's jurisdiction of DOLI decisions by requiring that they be appealed to the
16 HRC within fourteen days. Section 49-2-503(3)(c), MCA.

17 2. As subject matter jurisdiction cannot be "forfeited or waived, nor
18 can it be conferred by the consent of a party," this Court lacks jurisdiction over
19 BNSF's petition for judicial review. *Miller v. 18th Jud. Dist. Ct.*, 2007 MT 149, ¶ 44,
20 337 Mont. 488, 162 P.3d 121 (citations omitted); *Shoemaker v. Denke*, 2004 MT 11,
21 ¶ 31, 319 Mont. 238, 84 P.3d 4.

22 3. Further, a party to an administrative action may only appeal the
23 agency decision if he "has exhausted all administrative remedies." *Mountain Water*
24 *Co. v. Dep't of Pub. Serv. Regulation*, 2004 Mont. 11, ¶ 19, 319 Mont. 238, 84 P.3d

1 11; *Shoemaker*, ¶ 31. Here, there is no dispute that BNSF failed to exhaust its
2 administrative remedies by timely appealing the hearing officer's decision to the HRC.

3 4. In the alternative, BNSF requests that this Court issue a writ
4 requiring the HRC to allow its appeal. To obtain such a writ, BNSF must prove that
5 the HRC exceeded its authority, acted unlawfully, or should be compelled to act. See,
6 e.g., Sections 27-25-102 and 27-26-102, MCA. Here, the HRC simply complied with
7 Section 49-2-503(3)(c), MCA, by making the hearing officer's decision a final order
8 which "is not appealable to the district court." BNSF missed the appeal deadline and
9 has no basis to compel any action from this Court or the HRC. The HRC does not
10 have authority to lengthen statutory deadlines and did not err in failing to extend the
11 statutory deadline on BNSF's behalf. See A.R.M. 24.9.113(3).

12 5. Whether the fourteen-day period is considered "jurisdictional" and
13 therefore binding or "categorical," the HRC cannot be compelled by this Court to
14 expand the fourteen-day period set forth in the statute. The legislature has limited this
15 Court's jurisdiction of DOLI decisions by requiring that they be appealed to the HRC
16 within fourteen days. Section 49-2-503(3)(c), MCA. This Court does not have
17 jurisdiction, and Spear's decision is final.

18 6. Because there was no timely appeal of the DOLI decision to the
19 HRC, it became the agency's final decision under Section 49-2-505(3)(c), MCA.
20 While not appealable by BNSF to this Court, the decision may be enforced by this
21 Court pursuant to Section 49-2-508, MCA, which provides, in part:

22 **Enforcement of commission or department order or**
23 **conciliation agreement.** If the order issued under 49-2-506 is not
24 obeyed, the commissioner, the department, or a party may petition the
25 district court in the county where the discriminatory practice occurred or
in which the respondent resides or transacts business to enforce the
commission's or department's order by any appropriate order.

1 7. Pursuant to Sections 49-2-505(8) and 49-4-102, MCA, Cringle, as
2 the prevailing party, is also entitled to petition this Court for an award of attorney fees
3 incurred to prove BNSF's illegal conduct.

4 8. While BNSF requested that the deadlines for enforcement of
5 portions of the final agency decision entered by this Court on December 14, 2009 be
6 stayed pending its petition for judicial review, BNSF acknowledged that those
7 deadlines would not be stayed if this Court denied its petition.¹

8 9. On March 29, 2010, Cringle's counsel was instructed to submit an
9 affidavit of attorney fees and costs. No objection to fees having been filed by BNSF,
10 this Court entered Judgment in favor of Chad Cringle and against BNSF, and affirmed
11 the final agency decision dated September 2, 2009, as itemized above.

12 10. Thereafter, BNSF filed its motion to stay execution of the
13 judgment and requested approval of its *supersedeas* bond in the amount of
14 \$293,150.54. Because the *supersedeas* bond was deemed insufficient to cover the
15 judgment under Rule 22(1)(b) of the Montana Rules of Appellate Procedure, and
16 because grounds for the stay did not appear warranted, especially since this case is
17 analogous to the above-cited discrimination cases which the Montana Supreme Court
18 has affirmed, this Court denied BNSF's request for stay of execution and for approval
19 of its insufficient bond.

20 11. The Court now concludes that its Order of June 11, 2010 should
21 be vacated due to the failure of this matter to be promptly resolved. This Court's Order
22 of June 11, 2010 is inconsistent with this Court's earlier Order denying approval of the
23

24 ¹ BNSF's Br. Supp. Mot. Reconsideration of Order Granting Dep't Cross-Petition for
25 Enforcement, at 4.

1 *supersedeas* bond. That, coupled with the failure of this case to progress and the
2 drastic economic impact this case is having on Cringle, causes this Court to hereby
3 vacate its June 11, 2010 Order.

4 12. Although there is no Montana Case law directly on point, federal
5 case law pursuant to Rule 8(a) of the Montana Rules of Appellate Procedure — the
6 corresponding rule pertaining to stays on appeal — provides for the consideration of
7 four factors. They are: 1) whether the stay applicant has made a strong showing that
8 he is likely to succeed on the merits; 2) whether the applicant will be irreparably
9 injured absent a stay; 3) whether issuance of the stay will substantially injure the other
10 parties interested in the proceedings; and 4) where the public interest lies. *Stormans,*
11 *Inc., v. Selecky*, 526 F.3d 406, 408 (9th Cir. 2008); *Hilton v. Braunskill*, 481 U.S. 770,
12 776 (1987). Based on the previous findings and conclusions, this Court concludes that
13 all four factors weigh in favor of denying BNSF's application for stay and approval of
14 a *supersedeas* bond.

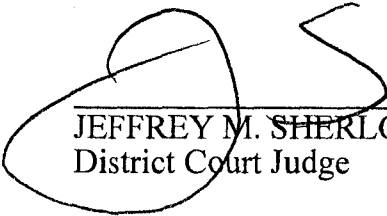
15 From the foregoing Findings of Fact and Conclusions of Law, the Court
16 enters the following:

17 **ORDER**

18 1. BNSF's motion to stay execution of the Judgment entered herein
19 and for approval of its *supersedeas* bond is DENIED.

20 2. This Court's June 11, 2010 Order is VACATED.

21 DATED this 12 day of July 2010.

22
23 
24 JEFFREY M. SHERLOCK
25 District Court Judge

1 pcs: Clerk of the Montana Supreme Court
2 Jeff Hedger/Benjamin O. Rechtfertig
3 Terry N. Triewelier
4 Marieke Beck

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